I. Introduction and scope of the topic

I once heard from a very wise older arbitrator that past practice is perhaps the most used and most abused concept in all of labor relations. He analogized it to the union arguing that past practice was like the sun coming up in the morning. It has always come up like that in the past and there is nothing to lead anyone to believe that it won’t keep doing that forever. The employer, he pointed out argued that it was like lightning striking. Sure, it happened once this way, but only because certain innumerable factors came together in the cosmos to create a confluence of factors so unique and so unduplicatable that they will never happen again. Past practice, he pointed out is somewhere in between these two scenarios. As always, I thank my father for imparting this bit of wisdom to me.

The scope of this discussion will be to define what the commentators have suggested past practice can be used for, how to define it. In other words, what is it really, what isn’t it and how does it change over time? We will discuss how a past practice, once established can it be abolished or changed.

The Court in Steelworkers v Warrior and Gulf, 363 U.S. 574 (1960), one of the famous Trilogy cases, noted as follows:

The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law -- the practices of the industry and the shop -- is equally a part of the collective bargaining agreement, although not expressed in it. See, 363 U.S. at 582.

The Trilogy cases make it clear that an arbitrator’s award will be upheld if it “draws its essence” from the labor agreement. See, Steelworkers v Enterprise Wheel and Car, 363 U.S. 592, 597 (1960). Thus, custom and practice are frequently used to determine contractual intent and to create binding past practices. The question now is; what is necessary to do that?

A. WHAT IS A PAST PRACTICE AND WHAT CAN YOU DO WITH IT?

WHAT IS IT?

Past practice has been defined as a ‘prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.’ See, Richard Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, in Arbitration and Public Policy 30 (S. Pollard ed. 1961). A past practice is thus nothing more, or less, than a custom or an accepted way of doing things as between two parties to a labor agreement that can provide either assistance in interpreting contract language where that language is ambiguous or to actually provide a binding set of terms for matters not included in the labor agreement.
Clearly, as the commentators have discussed, the mere fact that something happens once or even multiple times does NOT mean that a binding past practice has occurred. The question is thus whether having done something in the past, that course of conduct will be binding in the future. This discussion will thus focus on whether something is a binding past practice as opposed to a happenstance event that has no particular evidentiary or contractual significance and therefore does not bind the parties to doing it that way in the future.

**WHAT IT ISN’T**

As noted, past practice is one of the most frequently misused terms in all of labor relations. Just because something has happened once does not make it a binding past practice – and that IS the operative term – binding, i.e., required.

**One-time occurrences** are generally not enough. As noted below, there is an element of repetition that is required to establish a past practice. Note though, that if it has happened once that might still be evidence of contractual intent in a case

**The failure to grieve** an event is also generally not considered a past practice. There are many reasons not to file a grievance when something has, or has not, happened that the union later says is a violation. The union may not have known about it, (in which case there would be issues with acceptability and mutuality – see below), or the union may have decided that the facts of a particular case did not warrant a formal grievance or they may have found that the matter was either not “worth it” or was moot at some point. The fact that the same event was not grieved in the past does not necessarily establish a past practice. As one arbitrator noted, “mere non-use of a right does not entail the loss of it.” See Elkouri 6th Ed. at 635, citing to *Esso Standard Oil*, 16 LA 73 (McCoy 1951).

See also Elkouri 8th Ed. At section 12.9, page 12-25, “a party’s failure to file grievances or to protest past violations of a clear contract rule does not bar that party, after notice to the violator, from insisting on compliance with the clear contractual requirement in future cases.”

**Use of managerial discretion.** This is discussed more below but if management had the discretion to decide whether to do/grant something all along, the fact that it has done so consistently in the past does not necessarily require that same result in the future.

For example, if the CBA gives management the discretion to grant vacation leave but it has always allowed any employee to take whatever week off they wanted, does that require it in the future? Not necessarily. Each time it was granted, management exercised its discretion based on whatever factors it determined were important at the time and allowed it. That does not require that the next time an employee asks for vacation time on the 4th of July week it will be granted if management decides it cannot grant it at that time.

**WHAT CAN YOU DO WITH IT?**

Elkouri has suggested that past practice can be used for at last three major purposes. “1) to provide the basis of rules governing matters not included in the written contract; 2) to indicate the proper interpretation of ambiguous language, or 3) to support allegations that the clear language of the written agreement has been amended by mutual action or agreement representing the intent of the parties in making their written language consistent with what they regularly do in practice in the administration of their labor agreement.” (Note, that there is a difference of opinion among arbitrators on that latter point. If the CBA is clear but the practice is different some will enforce the practice; others will enforce the clear language. The Courts would likely uphold the decision either way as long as the decision “draws its essence from the labor agreement.” See below)
“Under certain circumstances custom and practice may be held enforceable through arbitration as being in essence a part of the parties’ ‘whole’ agreement.” Elkouri and Elkouri, *How Arbitration Works*, 5th Ed. p. 630.

Elkouri cites to several arbitrations that have upheld the principle that the words on paper do not always constitute the entire story when determining parties’ intent. The U.S. Supreme Court in one of the famous Trilogy cases held as follows: The arbitrator’s source of law is not confined to the express provisions of the contract, as in the common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it. *U.S. Steelworkers v Warrior and Gulf Navigation Co.*, 80 S.Ct. 1347, 1351-52, 46 LRRM 2416, 2419 (1960).

**CAN PAST PRACTICE BE USED WHERE THE CONTRACT LANGUAGE IS CLEAR AND UNAMBIGUOUS?**

There is always considerable argument in a case involving past practice as to whether a practice can be used at all to redefine clear contractual terms. There is no clear answer to this question. Some arbitrators will disallow past practice in the face of clear and unambiguous contract language while others will find that strong evidence of a past practice, if it meets the tests discussed below, can be used to determine parties’ intent even in the face of very clear contract language.

There is a clear difference of opinion. Elkouri in the 8th Edition at Section 12-9 cites examples of cases both arbitral and before the Courts for the proposition that “plain and unambiguous language are undisputed facts” and that if the language is clear it must be enforced per its terms, irrespective of the party’s negotiation history or evidence of the parties’ conduct. See, section 12-9 at footnote 158, citing Lackawanna Leather 113 LA 603 (Pelofsky 1999)

There are cases that allow the practice to prevail over clear language however. In a case from Minnesota, the Court upheld an award based on past practice that was contrary to clear contract language, See, *Ramsey County v AFSCME*, 309 N.W.2d 785 (Minn. 1981). There, the arbitrator found that the parties’ practice with respect to vacation accrual rates differed from the clear language of the contract. The matter arose when it was discovered that employees had for years been receiving vacation accruals and payments upon their departure from the County that were very different from what the clear language of the contract indicated. The County had argued that the clear language of the contract, and it was, governed the result and that paying the incorrect accrual rates for years was simply a clerical error that had no binding effect. The County also argued that the language of the contract where clear must always govern lest the whole process of negotiations be threatened with too liberal a use of past practice.

The County also argued that the so-called zipper clause made the past practice argument moot. This clause, it was argued, prohibited the use of any practice outside of the express terms of the collective bargaining agreement from being considered. It was proposed, the County claimed, to prevent the very argument being made by the union. (This discussion will not go into the details of the nuances of zipper clauses versus the so-called maintenance of benefits clause but suffice it to say that the zipper clause purports to prevent the use of past practice from consideration by an arbitrator and to limit the arbitrator’s jurisdiction to only the four corners of the labor agreement.)
Despite that, the arbitrator ruled in favor of the Union because the practice, even though different from the clear language in the agreement, met all the tests for a binding past practice. The Supreme Court upheld the arbitrator’s award and held as follows:

“past practice has been defined as a ‘prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.’ Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. 709 N.W.2d at 788, n. 3 (Citing from Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, in Arbitration and Public Policy 30 (S. Pollard ed. 1961).

Thus, the essential feature of any award, whether it is derived from reliance on past practice or not, is whether it “draws its essence from the labor agreement.” See, 709 N.W.2d at 790-91. It appears thus pretty clear that in Minnesota at least, it is well settled that custom and practice of the parties may be used to provide interpretation of existing language or it may be used to establish that the practice is binding even in the face of contrary and clear contract language, as in Ramsey County.

It should be noted however, that there is a reluctance of many arbitrators to overturn or alter what appears to be clear contract language. Not all arbitrators are so quick to allow evidence of past practice much less to use it to overturn clear contract language to the contrary. Elkouri, cites to Arbitrator Whitley McCoy as follows:

“… caution must be exercised in reading into contracts implied terms lest the arbitrators start remaking the contracts which the parties have themselves made. The mere failure of a Company over a long period of time, to exercise a legitimate function of management, is not a surrender of the right to start exercising such right. … Mere non-use of a right does not entail the loss of it. See Elkouri 6th Ed. at 635, citing to Esso Standard Oil, 16 LA 73 (McCoy 1951).

The exercise of managerial discretion, even if consistent in the past, does not render it binding in the future if indeed management had the discretion to decide to do something or not all along. The eminent arbitrator Harry Shulman has also observed the need for caution as well in using past practice for more than it was intended. His statement has been quoted many times:

“There are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment to the future. Such practices are merely present ways, not prescribed ways, of doing things. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion.” Elkouri at p. 636 citing to Ford Motor Co., 19 LA 237, 241 (1952).

Some of these cases are now getting old but their principles remain fresh and relevant today. Past practice, while it may well be used to provide clarity to unclear language or to supplant the agreement where it is silent, has limitations to its use and its effect.
HOW DOES ONE PROVE THAT IT EXISTS? – WHAT ARE THE ELEMENTS?

Mittenthal noted that certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in Arbitration and Public Policy 30 (S. Pollard ed. 1961). Elkouri states it in slightly different terms as follows: In the absence of a written agreement, ‘past practice,’ to be binding must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties.” Elkouri at 632 citing to *Celanese Corp. of America*, 24 LA 168 (Justin 1954).

CLARITY AND CONSISTENCY – UNEQUIVOCAL - Thus while there is some disparity in definition, the basic concepts remain the same. It is clear that the practice must be clear and consistent, i.e. unequivocal. Obviously if the practice itself has varied over time this fact would seriously undercut the argument that there exists a binding past practice. In *Ramsey County* for example, it was shown that the vacation accrual rates had been different from the contractually provide rates for years.

LONGEVITY AND REPETITION

Evidence that the practice has gone on for a long period of time is essential. Obviously, if a practice occurs only once such facts would undercut the claim that this was the mutually accepted way of doing things in the future. While a practice may well become binding even if it occurs only once this would certainly be an argument that would hurt the claim. Certainly, a past practice should be “readily ascertainable over a reasonable period of time.” This would strongly imply that it should occur multiple times as a prerequisite for it to be binding.

ACCEPTABILITY

How acceptable a practice is will depend on the facts and whether the arbitrator feels that the parties have come to accept this as the way they must and should continue to address a recurring situation. This, along with the discussion of the “underlying circumstances” will be very fact-dependent.

Generally, evidence that the parties operate under the practice with the full knowledge of the other party is very beneficial to the party seeking to enforce the practice. Each case will be different but the longer one can prove the practice has existed and the stronger the evidence is that the parties all knew it existed, despite possible language to the contrary or without language at all, the better.

IS THE CONTRACT LANGUAGE CLEAR OR IS IT AMBIGUOUS? DO ACTIONS SPEAK LOUDER THAN WORDS?

Many arbitrators have noted that the language in question, if such exists, must be ambiguous in order for evidence of past practice to even be introduced. Not all arbitrators apply this, as in *Ramsey County*, cited above. Certainly, parties seeking to defeat the claim of past practice will argue that the language of the contract is clear and must be adhered to without regard to custom and practice.

Elkouri notes that “The general attitude of arbitrators is illustrated by Arbitrator Charles Killingsworth, who in noting, that the parties had operated under a provision for nearly three years before requesting an arbitrator interpret it, stated that he had ‘a context of practices, usages, and rule of thumb interpretations by which the parties themselves’ had gradually given substance to the disputed term.” Nonetheless, [other arbitrators] have added a note of caution … that ‘in interpreting a collective bargaining agreement probably nothing is more capable of constructive use or susceptible to serious abuse as appeals to custom and practice.” Elkouri at p. page 648.
Generally, while custom and practice can be used to establish the intent of ambiguous contract language, many arbitrators will not use custom and practice to give meaning to language which is clear and unambiguous. See discussion above. Obviously, what is clear and what is not will vary. Elkouri cites several arbitrators who, when faced with clear contract language, have applied that language even though there was evidence of a contrary practice. See Elkouri 6th Ed. at p. 651-52. See also, \textit{Lake Benton Educ. Ass'n and ISD #404, BMS case # 02-PA-571} (Fogelberg 2002), \textit{BASF Wyandotte}, 84 LA 1055 (Caraway 1987).

It should be noted too that the mere allegation that the language is ambiguous does not make it so. These cases are generally very fact specific but simply having a dispute about it does not equal the conclusion that it is ambiguous. See, e.g., \textit{Education Minnesota and Princeton Schools, ISD 477, BMS case # 03-PA-243} (Jacobs 2003). In that case the language was found to be clear and provided that, “teachers employed prior to September 1, 1972, full single and dependent health insurance shall be provided by the school district for any teacher retiring at age fifty-five 55 or thereafter until such teacher attains the age of sixty-five (65) …”

The District denied the teacher health insurance even though he started before 1972 and was 55 when he retired, arguing that he did not qualify for health insurance since he did not also qualify for severance pay under a different article. The practice had been not to pay health insurance where the employee did not also qualify for severance pay. The district argued that the language was ambiguous and that the practice should prevail and that the grievance itself made the language ambiguous, at least in the context of how it related to the severance article, which was a separate provision.

The grievance was sustained based on the clear and “unambiguous” language requiring payment of health insurance.

\textbf{SOME OTHER EXAMPLES OF PAST PRACTICE}

\textit{Rice County, Minnesota and MN Public Employees, MN BMS CASE #17-PA-0653} (Jacobs 2017)

Since the early 1990’s the County had a policy of allowing deputies to take squad cars home. In exchange for that deputies work an extra 15 minutes. The advantage to the employees is that they start their shift the moment they get into the cars and they sign out the moment they arrive back home. They do not have to leave the squad car at the office and drive home - sometimes 20+ minutes away.

The practice was never “forced” on anyone and was totally voluntary. Most deputies liked the practice and eagerly signed up for it. They save time and money by not driving their own vehicles to and from work and liked that they had the car parked at their house in case there was an emergency.

The practice has been consistent, longstanding (25+ years) well-known (literally everyone knew about the practice, including the union steward who had been with the department for many years as well.) As noted above, it was the accepted practice.

During negotiations for the latest CBA though, the union counsel got wind of the practice and decided to challenge it as violative of the CBA’s provisions on overtime and claimed that the extra 15 minutes per shift should be paid for at overtime rates. He pointed to the contractual provisions regarding the shift schedules and the overtime provisions that called for time and a half pay for time worked past the normal shift.

The relevant contract language provided as follow:

“Employees will be compensated at one and one-half times the employee’s regular base pay rate for hours worked in excess of the employee’s regularly scheduled shift.

Overtime will be calculated to the nearest 15 minutes.”
The union claimed that these provisions were clear and provided that any and all time worked past the “regularly scheduled shift” must be paid at overtime rates. There was no dispute that the deputies who got a take home car did work 15 minutes in excess of their regular shift. The union's argument was this simple – employees work 15 minutes extra; they get 15 minutes extra pay at OT rates, take home car notwithstanding.

Further, the take home car policy did not reference the 15 minutes at all nor did it contain any provision amending the contract language cited above. The union also claimed that this was a unilaterally determined policy and violated the union security clause since the union did not negotiate it.

The union attorney further claimed that there was no binding past practice because the union business agent – not an employee of the department but rather the union – did not know about the practice and that he alone had “legal signing authority” to bind the union. Under the union's internal rules, only the BA had the authority to sign the contract or sign any MOU’s etc. that bound the union. Without him knowing about that, the union argued there can be no past practice and one must then revert to the contractual provisions, which he argued were clear and unambiguous and required that the 15 minutes of “extra” time should be compensated at OT rates.

Does the union win?

No; for several reasons. First, there is no requirement in the arbitral commentary or precedent that requires that a past practice be known or accepted by those with “legal” signing authority on behalf of either party.

Past practices reflect the “law of the shop” and if the employees all know and accept it, the supervisory authority knows and accepts it and the union steward knows about it, that’s all that is generally required. It is based on actual practice in the real world and does not always depend on legal or technical rules.

Past practice has been defined as a ‘prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.’ See Richard Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, in Arbitration and Public Policy 30 (S. Pollard ed. 1961). A past practice is thus nothing more, or less, than a custom or an accepted way of doing things between two parties to a labor agreement that can provide either assistance in interpreting contract language where that language is ambiguous or to actually provide a binding set of terms for matters not included in the labor agreement. Clearly, as the commentators have discussed, the mere fact that something happens once or even multiple times does NOT mean that a binding past practice has occurred. The question is thus whether having done something in the past, that course of conduct will be binding in the future.

Certain qualities distinguish a binding past practice from a course of conduct that has no particular significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. (Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, in Arbitration and Public Policy 30 (S. Pollard ed. 1961).

The question here is whether the fact that the union steward knew about the practice provide sufficient evidence to establish the acceptability and mutuality piece of the puzzle. It was clear that he and literally every deputy in the department for 25 years knew about the practice and accepted it. There was some dispute about whether the prior business agent – for a different union, by the way, knew about it, but even if he did not, there was ample evidence that the steward knew of it.
Second, the argument raised by the union wasn’t well thought out. Was he really suggesting that only those with “legal signing authority” must know about the practice in order for it to be binding? In the case at hand that would literally mean that a majority of the County Board, who may or may not have had any idea of the practice, would have to have knowledge of the practice. This would open the door for an employer to argue that no past practice could ever exist unless perhaps all, or at least a majority, of those with the authority to legally bind the employer to a contract or other legal instrument were shown to know of and accept the practice.

That is not what the Mittenthal article says, nor did it find any compelling authority anywhere in the literature. It would mean that unless it could be shown that a majority of the governing body knew and accepted the practice there could never be one.

**ONCE THERE IS A PRACTICE ESTABLISHED, CAN IT EVER BE CHANGED?**

The short answer is yes. There are several ways in which a practice can be altered or even terminated. Some of these ways are as follows:

**PAST PRACTICE SUBJECT TO REASONABLE REGULATIONS:**

Arbitrators have held that a practice may be binding but is still subject to reasonable regulations to prevent its abuse. Elkouri notes that the mere fact that a benefit has been established by a past practice does not necessarily mean that all arrangements by which it has been provided are frozen forever. In cases where the practice was established to provide for parking for employees the company was allowed to provide substitute facilities for that purpose. Elkouri 6th ed. at p. 642. Thus, even practices that have been established are subject to some regulation and may be altered as circumstances warrant. These will be very fact specific cases.

**PAST PRACTICE CHANGED WHERE THE UNDERLYING REASON FOR THE PRACTICE HAS CHANGED:**

Elkouri notes that practices may change or be eliminated where the underlying basis for them has changed over time. The rule was stated as follows: “It must be stated as a general proposition that, absent language in the collective bargaining agreement expressly or impliedly to the contrary, once the conditions upon which a past practice has been based are changed or eliminated, the practice may no longer be given effect.” *Gulf Oil Co*, 34 LA 99 (Cahn 1959).

If for example technological change has occurred that changes the way things have been done that might be a reason to do away with a past practice. Further, if there have been changes in the operation or a change in venue of the operation, those changes might also be used to obviate a practice. As one can imagine, these are fact specific cases and require evidence of what the change is and how it impacted the operation.

The operative language in the statement of the rule is “absent language in the collective bargaining agreement.” We are talking about practices which draw their essence from the collective bargaining agreement but are not actually found expressly or impliedly in it. These situations will again be very fact specific but the commentators seem to agree that where a practice has grown up over time in response to a given set of problems or circumstances, the practice may be altered where those underlying conditions are changed. Elkouri notes the example of a plant that gave 10 minutes of overtime to allow painters to clean their tools being changed where management fixed the congestion problem that had created the need for the additional time in the first place. Elkouri 6th Ed. at p. 643.
As a practical matter, it is very likely a rare situation where a past practice has been arbitrated and then not somehow addressed by contract language in some fashion. See discussion below. Elkouri makes reference to the fact that at least one arbitrator allowed public safety to change a past practice which had grown up over time. One could certainly envision public safety concerns giving rise to situations where old practices would be altered or eliminated and new ones created.

REPUDIATION OF THE PAST PRACTICE DURING NEGOTIATIONS:

Perhaps the most widely used ploy to obviate past practice is to repudiate the practice during negotiations for the next contract. Past practices it must be remembered are part of a collective bargaining agreement and may be eliminated or modified by one party giving the other notice of the intent to terminate the practice at the end of the current contract. The great weight of arbitral authority holds that even absent a change in the underlying basis for a past practice and even though that practice may not be subject to change during the life of a contract, that practice may be subject to termination by one party giving the other notice of intent not to carry over the practice into the next contract.

This must generally be done during contract negotiations. Once this has been done, the party seeking to continue the practice must negotiate the practice into the collective bargaining agreement.

Arbitrator Mittenthal states as follows: Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For ... if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.

That inference is based largely on the parties’ acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of the new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In the face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding.” Elkouri, at p. 643-44, Citing Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, proceedings of the 14th Annual Meeting of the NAA.

There may be a difference between a repudiation of a past practice where the language is ambiguous, and thus reliant upon the practice to give it the meaning the parties intended, versus the repudiation of a practice based upon clear language, which may not. In the former instance the parties would need to negotiate different language in order to overcome the practice even where there has been a repudiation of that practice during negotiations by one party. In the latter instance, unless the parties negotiate different language, the clear language would overcome the practice where one party has properly repudiated it during negotiations.

SOME EXAMPLES OF REPUDIATION OF PAST PRACTICE:

SEIU Local 284 and ISD 272, Eden Prairie Minnesota Schools, MN BMS # 03-PA-819 (Jacobs 2003).

The CBA between a school district and a union had very clear language that overtime would be paid for “work performed” in excess of 40 in a work week. Note that it did not say hours “paid.”

There was however a clear, longstanding and well-established practice of paying bus drivers OT rates for taking the student athletes to a volleyball tournament on the Saturday following the first week of school.
The drivers were paid for the Labor Day holiday, but of course did not work it. The Saturday tournament was a 4-hour assignment and for years they had been paid 4 hours of overtime for those hours. Without more this might well have been decided in the union's favor under a general past practice theory.

During negotiations for a successor CBA though, the District sent a letter to the union that read in relevant part as follows:

Please be advised that after the expiration of the current collective bargaining agreement between Custodians and the School District, the School District will discontinue the practice of incorrectly calculating overtime. … The change in the School District’s practice will begin on the date the July 2001 through June 30, 2003, collective bargaining agreement is executed by the parties.”

This was directed at the practice of calculating overtime using hours “paid,” not hours worked.

The union did not seek to change the language during negotiations, instead arguing that the practice survived the expiration of the old CBA and the signing of the new CBA. The language did not change, but was clear and provided for overtime only for work performed in excess of 40 hours worked in a week.

**Does the union win?**

No. Here the language was clear and the practice was different. Thus, in order to change the practice, the language had to change and the union had the burden of negotiating different language. Since the language did not change, the District had properly repudiated it in negotiations by sending the letter above. The issue is appropriate notice to the other party that the practice has been repudiated. Here, the practice died with the expiration of the old CBA and the language in the new CBA controlled.

Based on the almost unanimous line of arbitral authority, the practice was allowed to be discontinued on these facts.

See, also, *National Tea Company*, 94 LA 730 (1990) wherein the arbitrator held that past practices do not necessarily continue *ad infinitum*, but may be repudiated by either party through timely and proper notice of intent to do so before or during negotiations, and *Gillette Company*, 1996 W.L. 874463 (Fogelberg 1996) the arbitrator discussed a fact scenario very similar to that presented in *Eden Prairie Schools*.

**LELS and City of Blaine, Minnesota, MN BMS 15-PA-0671 (Jacobs 2016).**

In a similar, but not identical, case there was also a clear past practice regarding contributions to an employee cafeteria plan.

The relevant language provided as follows:

The EMPLOYER agrees to contribute One Thousand Twenty Dollars ($1,020.00) per month per employee for the purchase of required and/or optional benefits of the cafeteria plan from January 1, 2015 through December 31, 2015.

There was a longstanding and well accepted practice whereby employees could opt out of single coverage, since many had coverage through their spouse. If they did so the city would then provide the stated amount in the CBA, i.e. the $1,020.00, for the purchase of coverages under the cafeteria plan, less the cost of single coverage plus $50.00 per month. The $50.00 was simply added to the employees’ paychecks.
There was no question that this practice was binding and the union initially filed a grievance to have the entire amount paid to the employees seeking to have the entire amount paid to the employees without the deduction for the cost of single health coverage. The union withdrew that first grievance, essentially acknowledging the binding effect of the practice.

The union then sent a notice seeking to repudiate the practice during negotiations for a successor agreement. The city responded by telling the union that it would need to negotiate different language – since there was no language at all calling for the payment of the $50.00.

No changes were made in the language and the practice continued. After negotiations were done and the contract settled, the union then filed another grievance claiming that the practice had been repudiated and argued that the employees should be paid the entire amount of the contribution even though they had opted out of single coverage.

Again, the language did not change and there was no additional language added to the contract. The contractual language was in that case ambiguous – in fact it was silent on the practice and the practice was necessary to “give meaning” to the contractual language. In that case the practice actually added something to the language.

In that case, the union sought to change the practice but was unable to negotiate different language calling for the employees to get the full amount of the contribution even though they opted out of coverage. There was further some evidence that the union actually tried to do that in negotiations but agreed to drop that request in exchange for concessions on wages and other matters.\(^1\)

Thus, it is fairly clear that a binding past practice can be repudiated by giving timely notice of the intention to do so. Once this has been given, it falls to the party seeking to continue the practice to negotiate this into the contract. One cannot simply assume that because the underlying language did not change, that the practice will continue.

**The language did not change this time either – does the union win?**

Again, no. Perhaps the most widely used ploy to obviate past practice is to repudiate the practice during negotiations. Past practices are part of the CBA and may be eliminated or modified by one party giving the other notice of intent to terminate the practice at the end of the current CBA. The weight of arbitral authority holds that even absent a change in the underlying basis for a past practice and even though that practice may not be subject to change during the life of a contract, that practice is subject to termination by one party giving the other notice of intent not to carry over the practice into the next contract. This must generally be done during contract negotiations.

Once this has been done, the party seeking to continue the practice must negotiate the practice into the collective bargaining agreement.

Professor/Arbitrator Mittenthal states as follows: Consider first a practice that is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For … if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.

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\(^1\) That was also a factor in the decision but the teaching point is how to repudiate a practice – or not.
That inference is based largely on the parties’ acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of the new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In the face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding.” Elkouri, at p. 643-44, Citing Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, proceedings of the 14th Annual Meeting of the NAA.

SUMMARY OF THIS:

If the CBA language is clear, the party seeking to keep the practice must change the language in order to change the result. If the language does not change the implication is that the practice was repudiated.

If the language is ambiguous and the practice has been used to clarify it, the party seeking to change the practice must seek to amend the contractual language in order to change the result. If the language does not change the implication is that the practice remains in effect, even if there has been a notice sent regarding the practice.

Obviously, this is premised upon the requirement of sending a timely and appropriate notice to the other party during negotiations for the new CBA. It is also dependent on how the arbitrator views the language. Is it clear or is it ambiguous? See, cases above.

There is no special language but the notice must be specific enough to advise the other party of the intent of the language and to let them know what must happen in order to change the practice. Past practices are only in place for the life of the CBA unless they are changed in some fashion. Having said that, the next case provides a caveat to that.

A CAUTIONARY TALE

City of Bloomington and IAFF, Minnesota BMS CASE # 04-PA-99 (Jacobs 1999).

One must be careful however not to reinstate a practice once it has been repudiated. In the Eden Prairie Schools case cited above, the employer “did it right” by discontinuing the practice the moment the new CBA was signed. In City of Bloomington however, the City tried to repudiate the practice during the negotiation and interest arbitration process and was successful in doing so, but then made the mistake of re-upping it during the life of the next contract.

The city had a practice of allowing its 911 dispatchers to leave city hall for lunch. There was little question that this was a binding past practice and everyone agreed it was.

City hall moved to a new location that was next to a major rail line. The City argued during negotiations that it would no longer allow dispatchers to leave for lunch. First, there was a risk that they could get caught on the wrong side of the tracks during an emergency. Second, the new city hall was much larger and had a nice lunch room for people so they would be available for calls. The city argued during negotiations that the practice needed to change since the underlying reason for the practice had changed.

When the new contract went into effect there was language that disallowed people from leaving. That should have been the end of the practice. The problem arose when the police chief continued to allow dispatchers to leave for lunch without consequence and with his full knowledge for almost a year after the execution of the new contract.
When a new chief came on board, he wanted to revert to the contract language. In that circumstance, the practice had essentially been re-started and could not be changed during the life of the current agreement without negotiation by the parties. Thus, be very careful to actually stop the practice or you may unwittingly restart it.

Certainly, this practice likely was repudiated again in the next round but the case stands as a reminder to make sure (as the employer did in the Eden Prairie School case cited above) to make sure the practice is actually changed if the practice is repudiated.

**PRACTICE TIP:** Note too that the repudiation should be very specific. I do not believe that sending a general letter stating that “any and all” past practices will end as of the end of the contract term and leaving it at that will be sufficient. I could not find any reported case were that scenario was presented but it would seem that in order to repudiate a practice the notice must be quite specific as to what that practice is and what the party seeking to change it wants to do with it.

**ZIPPER AND MAINTENANCE OF BENEFITS CLAUSES**

These two types of clauses are fundamentally different and almost to the exact opposite effect. A zipper clause “zips” the CBA closed and ostensibly does away with any practices that are not specifically set forth in the written agreement. As noted above though, the zipper clause only operates to close out any practices that were in effect at the commencement of the CBA. If those practices are allowed to continue past that date, the party seeking to argue in favor of the past practice may well have a valid argument that the practice survived the execution of the CBA with the zipper clause and that the practice continues.

A maintenance of benefits clause does the opposite and recognizes that any practices that were in effect at the commencement of the CBA and which have not been specifically voided in the language continue in effect.

**CONCLUSION**

The concept of past practice is one that continues to generate considerable discussion and disagreement among arbitrators, advocates and commentators alike. Past practice can certainly be used to interpret unclear language, but there remains disagreement to the extent to which it can be used to essentially overrule clear contract language that may be different from or even contrary to the practice. There are some arbitrators who rely on practice to fill gaps or even add matters to the agreement in the absence of contractual language. Further, there is disagreement about the full efficacy of zipper clauses purporting to remove any discussion of practice from the labor agreement or disputes about it. Actions may well speak louder than words.

There is generally more consistency about the elements necessary to create one however. Longevity, consistency, acceptability and mutuality are widely accepted as the factors used to determine if the parties in fact have created a binding practice. One must be mindful of the limits on these though and be prepared to discuss whether what seems to be a binding practice is in fact the use of discretion by the employer or the simple non-enforcement of the practice by one side or the other. Under those circumstances, a practice may not exist.

Finally, if you have a practice, it can be repudiated or changed. If the underlying reasons for it have changed, so too does the practice. If during negotiations one side or the other properly repudiates it, that also can change it. Remember, the contract belongs to the parties and you can change a contract and a practice, whether it’s binding or not, by negotiation.

Past practice – BOPA 2019